**IN THE COURT OF APPEALS OF IOWA**

No. 3-1039 / 12-1968
Filed January 9, 2014

**IN RE THE MARRIAGE OF TINA JUDITH BERNAL
AND DAVID BERNAL**

**Upon the Petition of
TINA JUDITH BERNAL,**
Petitioner-Appellee,

**And Concerning
DAVID BERNAL,**
Respondent-Appellant.

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Appeal from the Iowa District Court for Madison County, Joel D. Novak, Judge.

David Bernal appeals from the provisions of the decree dissolving his marriage to Tina Bernal. **AFFIRMED AS MODIFIED AND REMANDED.**

Jeffrey Kelso of Howe, Cunningham, Lowe & Kelso, P.L.C., Urbandale, for appellant.

Tina Bernal, Marion, pro se.

Considered by Doyle, P.J., Bower, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

**MAHAN, S.J.**

David Bernal appeals from the provisions of the decree dissolving his marriage to Tina Bernal. He contends (1) he should be granted physical care of the parties' three minor children, (2) Tina should not be awarded spousal support given her voluntary underemployment, and (3) Tina should not receive an interest in property David owned before the marriage. After de novo review of the record, we modify the decree to grant David physical care of the parties' three children but affirm the spousal support and property distribution provisions of the decree. We remand this case back to the district court to determine the proper amount of child support.

**I. Background Facts and Proceedings.**

David and Tina were married in 1995. During the marriage, they lived in Winterset with their three minor children: a son, born in 1997, and two daughters, born in 1998 and 2000.

David is employed as a firefighter, earning a net monthly income of $3832.66. His work schedule requires him to work one twenty-four-hour shift, followed by forty-eight hours off. David's mother assists him by providing childcare when he works his shift. At the time of trial, he was seeking a promotion to lieutenant, a daytime position.

Prior to the parties' separation, Tina did not work outside the home, instead raising the children and homeschooling them. At the time of trial, she worked part-time at a bed and breakfast owned by her mother and stepfather. The court imputed to her a gross monthly income of $1147.22 after finding she is capable of securing full-time employment at minimum wage.

After the parties separated in August 2011, David continued to reside in the marital home in Winterset and Tina moved to Marion. The parties' son resided with David and their daughters with Tina. The district court memorialized this arrangement in its October 13, 2011 order on temporary matters.

Although they had previously been homeschooled, the parties agreed to enroll the children in public school. Academic testing showed all three children were behind their peers academically. David enrolled the son in ninth grade at Winterset High School. The boy handled the transition well, making steady academic improvements, becoming involved in extracurricular activities, learning to play an instrument and joining the school band, and developing a social network.

While Tina initially enrolled the daughters in public school, she withdrew them two or three days later and enrolled them in a private, Christian school without consulting David. The school has twenty-four students attending kindergarten through eighth grade. Given the school's small size, the twelve students enrolled in fifth through eighth grade are in the same classroom. Because one girl is enrolled in fifth grade and the other in sixth, they attend class together. The school's principal acts as their teacher.

The district court appointed Jane Rosien guardian ad litem for the children. Rosien interviewed Tina, David, and the children, as well as the Winterset Community School District Juvenile Court School Liaison Officer, Winterset High School's Associate Principal, a licensed social worker who completed a mental health assessment on the girls, and Tina's sister and sister-in-law. In addition, Rosien reviewed pertinent documents, including email

summaries from Winterset High School teachers, Iowa Test of Basic Skills reports and academic assessments, information from the girls' teacher, and various recorded and printed communications between the parties and others.

On July 16, 2012, Rosien filed a twenty-page report detailing her findings and recommendations as guardian ad litem. In it she finds that although all three children struggled in the wake of their parents' separation and impending divorce, "[f]rom the perspective of outside, neutral persons," the son has done "very well" in his first year of public school, both academically and socially. While the daughters earned good grades in private school, Rosien states that both girls are "luke warm" about attending the school; the older daughter is only open to homeschooling and the younger daughter—while initially open to trying public school—later claimed she only wants to be homeschooled. The girls are not involved in any extracurricular or co-curricular activities and have not made any friends in the Marion area.

Rosien also finds the girls are "each independently hyper-vigilant in their efforts to avoid saying anything at all that would favor one of their parents over the other," instead claiming they are fine with whatever happens. Rosien states: "In my opinion, this posture and these statements are a sad testament to the turmoil these girls are truly feeling about the way they have been, and continue to be, exposed to and engaged in their parents' issues and pulled between their parents." Both girls were evaluated by a licensed social worker who found they are anxious and depressed and recommended weekly, individual therapy for each. While David has voiced his desire for the girls to attend therapy, Tina does not believe they need it.

In the report, Rosien also notes there are "frequent conflicts" during custody exchanges, with the parties arguing in front of the children. She details incidents in which Tina refused to make changes to the visitation schedule to accommodate the wishes of David and the children. Rosien opines: "It is difficult for Tina to be flexible regarding the parenting time schedule for the children. She perceives requests for change to be attempts at control and manipulation by David. She is unable to see when and/or how her inflexibility negatively effects and hurts the children."

While Rosien notes in the report that David "certainly is not above reproof," she finds he has "demonstrated the willingness and/or ability to be flexible in [his] beliefs when necessary for the benefit of the children." Rosien details David's active, supportive involvement in his son's public education, which she concludes "is at least part of the reason" why the boy had what everyone—aside from Tina and her family—believes was a successful year. "David has allowed the children to form friendships and have others, outside of family, meaningfully involved in their lives." However, the girls have "no one in their lives who they see as completely neutral or better yet, on their side. They have no one with whom they can speak openly and without risk of consequence."

The report concludes with Rosien finding the parties' son has done well academically, socially, and emotionally in David's care, while their daughters have struggled emotionally and socially in Tina's care. She states: "In my opinion, this is because Tina's unresolved and/or unaddressed issues have stood in the way of her effectively parenting the girls." Rosien concludes by recommending the children be placed in David's physical care.

Trial was held in late July 2012. In addition to the parties' testimony, the court heard testimony from Rosien; Tina's mother, sister, and, aunt; and David's mother and her neighbor.

On September 26, 2013, the court entered its decree. Although the children never stated a preference, the court speculated that the parties' son would prefer to live with David and—based on testimony that the girls were upset and began crying when they learned of the guardian ad litem's custody recommendation—that their daughters would prefer to live with Tina. The court also found it would be "extremely detrimental" to uproot the children again to place them in the same home. Taking these factors into consideration, along with its finding that both parents are capable of caring for the children, the court ordered the children's physical care to be split, with the parties' son remaining with David and their daughters with Tina.

Other relevant facts will be discussed below.

**II. Scope of Review.**

We review this equity action de novo. *See In re Marriage of McDermott*, 827 N.W.2d 671, 676 (Iowa 2013). In doing so, we review the entire record and adjudicate the issues anew. *Id.* Although we give deference to the district court's findings—particularly with regard to witness credibility—we are not bound by them. *Id.* We disturb the district court's ruling only when there has been a failure to do equity. *Id.*

**III. Physical Care.**

David first contends he should be granted physical care of all three children. He argues he is better able to provide a stable home environment for

the children. He also argues Tina has denied him maximum continuing contact with the children and has shown an unwillingness to support his relationship with the children.

In determining child custody, our primary concern is the children's best interests. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). The court's objective is to place the children in the environment most likely to bring them to healthy physical, mental, and social maturity. *Id.* In making this determination, we look at the statutory factors set forth in Iowa Code section 598.41(3) (2011), as well as those identified in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). *See In re Marriage of Will*, 489 N.W.2d 394, 398 (Iowa 1992). We also note that physical care arrangements that separate siblings are generally disfavored; although there may be circumstances where a split-care arrangement better promotes the children's long-range interests, there must be good and compelling reasons to depart from the general rule. *Id.*

A lot of the evidence presented at trial concerned the reason the parties' marriage ended and who was responsible for its demise. This evidence is only relevant to the extent it impacts the parties' ability to care for the children. We find no evidence of domestic abuse in the past fifteen years of the marriage. *See* Iowa Code § 598.41(3)(j) (listing a history of domestic abuse, as defined in section 236.2, is a factor to be determined in making the physical care determination).

We further find that whatever transpired between the parties only effects the children to the extent that the parties are now unable to cooperate and foster a relationship between the children and the other parent. In that regard, the

evidence shows David has been more flexible regarding the visitation schedule, while Tina's inflexibility has hurt the children. Tina has also, at times, involved the children in the parties' issues, which has the potential to damage the children's relationship with David. Furthermore, Tina has not involved David in important decisions regarding the girls. For instance, she withdrew the girls from public school and enrolled them in private school without consulting David.

The evidence also shows that Tina has failed to follow through with any of the recommendations regarding her mental health treatment. We, like the guardian ad litem, find this negatively impacts her ability to effectively parent the children. She also fails to recognize the girls' need for therapy in spite of a professional recommendation for such therapy. In contrast, David wishes the girls to be involved in individual therapy.

The district court based its physical care determination, in part, on speculation as to whom the children would prefer to live with. While we do give weight to a child's preference, *see* Iowa Code § 598.41(3)(f), there is no express statement as to preference. The district court's concern for uprooting the children after a tumultuous year is a more compelling reason to continue the split-care arrangement. But while changing the children's living situation once more is not ideal, it is necessary. The evidence shows the parties' daughters are not thriving in Tina's care and David is better equipped to minister to their best interests.

Upon our de novo review of the record, we conclude David should receive physical care of all three children because he has proven he possesses the ability to provide superior care for the children, and he is the parent most likely to

bring them to a healthy, physical, mental, and social maturity. *See Murphy*, 592 N.W.2d at 683. We modify the decree to place the children in David's care, subject to the visitation schedule provided in the decree. We remand this case back to the district court to determine the proper amount of child support.

**IV. Spousal Support.**

The district court found Tina was entitled to rehabilitative alimony and ordered David to pay Tina $500 per month in spousal support for a two-year period. David appeals this provision of the decree. He contends Tina should not be awarded spousal support because she is voluntarily underemployed.

Alimony is not an absolute right, but depends upon the circumstances of each particular case. *In re Marriage of Schenkelberg*, 824 N.W.2d 481, 486 (Iowa 2012). In determining whether to award spousal support, we consider the factors set forth by our legislature, which include the length of the marriage, the parties' age and health, the property distribution, each party's earning capacity, and the feasibility of the party seeking maintenance to become self-supporting at a standard of living comparable to that enjoyed during the marriage. Iowa Code § 598.21A(1). A trial court has considerable latitude in awarding spousal support, and we will only disturb such an award if it fails to do equity between the parties. *Schenkelberg*, 824 N.W.2d at 486.

We find the spousal support awarded to be equitable given the length of the parties' marriage, their earning capacities, Tina's voluntary removal from the workforce to stay home with the children, and her need for education or training to enable her to find employment that will allow her to support herself in a manner comparable to that enjoyed during the marriage. The award is for a

short duration—two years—which will allow Tina time to become self-sufficient. Although Tina was not employed full-time at the time of trial, the district court imputed to Tina the earnings she would have received if she had been employed full-time earning minimum wage. Considering her skills and lengthy absence from employment, we find a minimum wage was a reasonable basis by which to calculate her imputed earnings. Accordingly, we affirm the spousal support provisions of the dissolution decree.

**V. Property Distribution.**

David also appeals one aspect of the property distribution; he contends the court erred in including a home he owns on Watrous in the property distribution because it was premarital property. We disagree.

The legislature has only excluded gifted and inherited property from division. *See* Iowa Code § 598.21(6). Property brought into the marriage is not set aside and automatically awarded to the spouse who owned the property before the marriage. *In re Marriage of Fennelly*, 737 N.W.2d 97, 102 (Iowa 2007). Rather, the premarital character of the property is only one factor among many to be considered in dividing the property. *Id.* Other factors include the length of the marriage, contributions of each party to the marriage, the age and health of the parties, their earning capacities, and any other factor the court deems relevant. Iowa Code § 598.21(5).

The Watrous property was subject to division and was properly included in the property division. When considering the factors set forth in section 598.21, we find the overall property division to be equitable.

We affirm the district court's decree with the modifications stated herein and remand to the district court for calculation of child support. Costs of the appeal are taxed to David.

**AFFIRMED AS MODIFIED AND REMANDED.**